

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v.

SHAWN LEON JENKINS,

Defendant-Appellee.

Supreme Court
No. 125141

Court of Appeals
No. 240947

Washtenaw Trial Court
No. 01-1356 FH

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125141
DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF IN OPPOSITION TO
PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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FILED

OCT 14 2004

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SUPPLEMENTAL COUNTER-STATEMENT OF RELIEF SOUGHT

Defendant-appellee (hereinafter "Mr. Jenkins") requests that this Court affirm the Court of Appeals in an opinion discussing the factual circumstances that constitute a Fourth Amendment stop and reasonable suspicion.

Alternatively, Mr. Jenkins requests that this Court deny the plaintiff-appellant's (hereinafter "prosecutor's") Application for Leave to Appeal.

Alternatively, if this Court concludes that peremptory action under MCR 7.302(G)(1), is warranted because the actions of the police did not amount to a Terry stop by the time Mr. Jenkins's identification was sought, Mr. Jenkins requests that this Court remand this matter to the trial court to consider whether Mr. Jenkins was subjected to a Terry stop after his identification was requested and, if so, whether the stop was based on reasonable suspicion.

Alternatively, if this Court concludes that peremptory action under MCR 7.302(G)(1), is warranted because the officers had reasonable suspicion for a Terry stop at the time they sought Mr. Jenkins's identification, Mr. Jenkins requests that this Court remand this matter to the trial court to consider whether the subsequent police conduct in this matter exceeded the lawful scope of a Terry stop.

SUPPLEMENTAL COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. IS IT REASONABLE FOR A 21-YEAR-OLD BLACK MALE, NEITHER BEING LOUD NOR DRINKING, WHO HAS BEEN SINGLED OUT OF A GROUP OF 15-20 LOUD DRINKERS ON A SUMMER EVENING IN THE COURTYARD OF A PUBLIC HOUSING COMPLEX WHERE HE DID NOT LIVE AND APPROACHED BY TWO ARMED, UNIFORMED POLICE OFFICERS TO BELIEVE THAT HE CANNOT IGNORE THE POLICE AND WALK AWAY WHEN THEY SEEK HIS IDENTIFICATION IMMEDIATELY AFTER AN APPARENT RESIDENT SWEARS AT HIM, ASKS HIM WHO HE IS AND WHY IS HE ON HER PORCH?

The defendant-appellee answers this question: "Yes."

The trial court answered this question: "Yes."

The Court of Appeals answered this question: "Yes."

The plaintiff-appellant answers this question: "No."

- II. GIVEN THE LACK OF ANY SPECIFIC ACCUSATION OR COMPLAINT FROM THE UNIDENTIFIED WOMAN, DID OFFICER SPICKARD REASONABLY SUSPECT THAT MR. JENKINS WAS COMMITTING A CRIME BASED ON OBJECTIVE, ARTICULABLE FACTS AT THE TIME THE OFFICER SOUGHT MR. JENKINS'S IDENTIFICATION?

The defendant-appellee answers this question: "No."

The trial court answered this question: "No."

The Court of Appeals answered this question: "No."

The plaintiff-appellant answers this question: "Yes."

III. IN THE EVENT THAT THIS COURT DETERMINES THAT OFFICER SPICKARD DID NOT STOP MR. JENKINS BY THE TIME HE SOUGHT THE IDENTIFICATION, SHOULD THIS COURT REMAND THIS MATTER TO THE TRIAL COURT TO CONSIDER WHETHER MR. JENKINS WAS SUBJECTED TO A TERRY STOP AFTER HIS IDENTIFICATION WAS REQUESTED AND, IF SO, WHETHER THE STOP WAS BASED ON REASONABLE SUSPICION?

The Court of Appeals did not reach this question.

The defendant-appellee answers this question: "Yes."

The plaintiff-appellant would answer this question: "No."

IV. IN THE EVENT THAT THIS COURT DETERMINES THAT OFFICER SPICKARD LAWFULLY SEIZED MR. JENKINS AT THE TIME HE ACQUIRED THE IDENTIFICATION CARD, SHOULD THIS COURT REMAND THIS MATTER TO THE TRIAL COURT TO CONSIDER WHETHER THE SUBSEQUENT POLICE CONDUCT IN THIS MATTER EXCEEDED THE LAWFUL SCOPE OF A TERRY STOP?

The Court of Appeals did not reach this question.

The defendant-appellee answers this question: "Yes."

The plaintiff-appellant would answer this question: "No."

SUPPLEMENTAL STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Defendant-appellee (hereinafter "Mr. Jenkins") supplements the Statements of Facts presented in the application filed by the plaintiff-appellant (hereinafter "prosecutor"), as well as in Mr. Jenkins's response, with the following:

On the "evening," (Transcript of 1/24/2002 Evidentiary Hearing (hereinafter: "EH") at 31), of August 23, 2001, Ann Arbor Police Officers Geoffrey Spickard and Jeff Lind were dispatched to the area of 729 North Maple Road, due to a group of fifteen to twenty "subjects hanging out, being loud, and drinking." (EH at 4-5.) Officers Spickard and Lind drove to the area in a fully marked Ann Arbor police vehicle. (EH at 29.) The officers were in full uniform with badges and handcuffs and carried visible firearms in their holsters. (EH at 29.)

The townhouse at 729 North Maple Road opens onto the same courtyard as do 725 and 727 North Maple. (EH at 15.) The courtyard and its adjacent buildings are depicted in Exhibit 5, labeled and attached hereto as Appendix, Page 1. (EH at 15, 39.) Officer Spickard recognized many of the fifteen to twenty people in the courtyard as he and Officer Lind walked from their patrol vehicle. (EH at 5, 21.) Many of these people "had alcohol in their hands," (EH at 18 (quoting from Officer Spickard's police report)), and Officer Spickard observed

numerous containers of alcohol, (EH at 16), amounting to "certainly plenty of alcohol in the area," (EH at 19).

Defendant Shawn Leon Jenkins and one other person were sitting on the steps leading up to the porch of 727 North Maple Road. (EH at 20.) The front of 727 North Maple is depicted in Exhibit 6 attached hereto as Appendix, Page 2. (EH at 16, 39.) According to Officer Spickard, everybody else was standing in the courtyard area, (EH at 20), or sitting on concrete planters which serve as benches in the courtyard, (EH 16-17).

Officer Spickard did not see Mr. Jenkins with alcohol when he arrived. (EH at 19.) In fact, he never saw Mr. Jenkins holding an open intoxicant during the entire evening, (EH at 22), and agreed that Mr. Jenkins did not indicate to him that he had been drinking. (EH at 22.) Based on this evidence, the trial court concluded that there was no evidence of open intoxicants or open intoxication by Mr. Jenkins. (EH at 48.) Similarly, although the crowd itself was loud, (EH at 4-5), Officer Spickard did not see Mr. Jenkins being loud, (EH at 22).

Nevertheless, Officers Spickard and Lind walked directly to the steps where Mr. Jenkins and the other man were seated. (EH at 5, 33.) The officers passed through the crowded courtyard without contacting or stopping anybody else in the area, (EH at 33), notwithstanding the fact that many of the others were drinking openly, (EH 18-19), and Officers Spickard

and Lind's duties included policing incidents of open intoxication and intoxicants, (EH at 6). At the evidentiary hearing, Officer Spickard explained that he walked up to Mr. Jenkins and the other man because he thought the person sitting behind Mr. Jenkins may have lived at 727 North Maple, the address where the two were sitting, (EH at 20), so he approached 727 North Maple to make contact with a resident of the housing complex. (EH at 20.) Officer Spickard acknowledged that he had earlier testified that he walked to 727 North Maple because he was familiar with many of the people in the courtyard but he did not recognize either man seated on the steps of 727 North Maple. (EH at 21-22.) There was no indication that either officer went to 729 North Maple which was presumably the residence of the person who had prompted the initial dispatch. (EH, passim.)

When Officers Spickard and Lind walked straight up to the steps where Mr. Jenkins and the other person were sitting, Officer Spickard asked some general questions: What was going on? Was there a reason why everybody was gathering? (EH at 5.) There is no indication that Mr. Jenkins responded to any of these questions. (EH, passim.) At that time, an unidentified woman emerged from 727 North Maple, pointed at Mr. Jenkins and

asked "Who the fuck are you and why are you on my porch?" (EH at 5-6.)¹ She immediately went back inside. (EH at 23-24.)

With respect to this woman, Officer Spickard said he never interviewed her and did not know her name or address. (EH at 24-25.) In fact, Officer Spickard testified that he saw this woman for such a brief period of time that he would not have been able to identify her if he saw her again. (EH at 23-24.) Likewise, the record does not show that the officers ever addressed any questions regarding Mr. Jenkins to the man who had been sitting near him on the steps of 727 North Maple, (EH, passim), even though Officer Spickard thought that this other man might have been a resident of 727 North Maple, (EH at 20).

After the unidentified woman went back inside, Officer Spickard asked Mr. Jenkins whether he lived in the housing complex. (EH at 6-7.) Mr. Jenkins stated that he did not, so Officer Spickard asked Mr. Jenkins for some identification. (EH at 7.) Mr. Jenkins stood up, removed his card from a pocket, and handed his facially valid, (EH at 27-28), Michigan State Police identification card to Officer Spickard. (EH at 7.)

From the time the officer sought identification from him and continuing through the remainder of their encounter, Mr. Jenkins was not free to leave the two police officers. (EH at

¹ Not "allegedly accused Mr. Jenkins of trespassing," as characterized at page 1 of the Defendant-Appellee's Response To Application For Leave to Appeal.

26-27.) Officer Spickard testified that, had Mr. Jenkins run from him, he would have chased after Mr. Jenkins and forcibly stopped him. (EH at 26-27.) Moreover, the officers retained possession of Mr. Jenkins's ID card during the whole time they interacted with him, (EH at 27), and Officer Spickard would have refused Mr. Jenkins's request by to return the card, (EH at 28).

Officer Spickard examined Mr. Jenkins's ID card, and it showed that Mr. Jenkins was 21 years old. (EH at 27-28.) Officer Spickard then tried to get on his portable radio to call in Mr. Jenkins's name "to conduct a routine name check," (EH at 7), to see if Mr. Jenkins had a warrant, a personal protection order, a relevant probation or parole condition, "and any other information that might come back through the LEIN network," (EH at 26). However the LEIN channel was "busy," so there was a "line, a waiting line or a wait" that prevented Officer Spickard from getting through. (EH at 7-8.)

"After" Officer Spickard wasn't able to get Mr. Jenkins's name called in immediately, Mr. Jenkins's behavior became very nervous. (EH at 8.) Without explaining the basis for his opinion, Officer Spickard suggested that Mr. Jenkins "was continually wanting" to put his hand in a deep pocket Officer Spickard observed on the side of Mr. Jenkins's pants.

(EH at 8-9.)² Significantly, there was no testimony that Officer Spickard saw any sort of bulge indicating the presence of a weapon in Mr. Jenkins's pants. (EH, passim.) Moreover, neither Officer Spickard, a ten-year veteran of the Ann Arbor Police Department, (EH at 4), nor Officer Lind made any efforts at that time to investigate whether Mr. Jenkins possessed any weapons by patting Mr. Jenkins down, asking him if he had weapons or otherwise. (EH, passim.) The trial judge highlighted this factor when the prosecutor claimed that Mr. Jenkins's nervousness gave rise to reasonable suspicion. (EH at 49-50.) In his questioning on this point, the trial judge apparently determined that, if the LEIN information had promptly come back negative, Officer Spickard would not have further investigated, accosted or frisked Mr. Jenkins based on defendant's nervous "wanting" to put his hand in his pocket. (EH at 49.)

Some of the other people in the courtyard, whom Officer Spickard presumably recognized as residents of the housing complex, (EH at 21), told Mr. Jenkins that he could come into their homes, (EH at 9). "At the same time" as these invitations, Mr. Jenkins began to walk away from the police

² This is the sole reference at the evidentiary hearing to Mr. Jenkins's pockets. (EH, passim.) Officer Spickard did not testify at the evidentiary hearing that Mr. Jenkins "repeatedly attempt[ed] to put his hand inside a large pocket," as claimed by the prosecutor at page 7 of the Application for Leave to Appeal and by Mr. Jenkins at page 2 of his Response To Application For Leave to Appeal.

officers. (EH at 9-10.) Officer Spickard still retained Mr. Jenkins's ID and intentionally made no efforts to return it. (EH at 9, 27-28.) Instead, Officer Spickard and Officer Lind both walked alongside of Mr. Jenkins to the parking lot area where the police had left their patrol car. (EH at 10.) During this walk, both of the officers³ repeatedly "encouraged" Mr. Spickard to wait until they could call in his name and get the results of the LEIN check. (EH at 10.) When two other women began talking to Mr. Jenkins, and Mr. Jenkins stopped heading toward the patrol car and walked away from the officers, Officer Spickard put his hand on the small of Mr. Jenkins's back and said "Shawn, you just need to hold on for a minute while we get the results of your name check and then you'll be free to go." (EH at 10.) Officer Spickard and his partner directed Mr. Jenkins to the patrol car, (EH at 10), "to prevent him from walking away." (EH at 11.)

In his testimony, Officer Spickard characterized his statement to Mr. Jenkins, that he needed to hold on and then he would be free to go, as a "request." (EH at 11.)

When Mr. Jenkins and the police arrived at the patrol car, Mr. Jenkins put his hands were on the hood of the car and pressed his hip against its fender. (EH at 11.) Thereafter,

³ Not "one of the officers," as claimed at page 1 of the prosecutor's Application for Leave to Appeal.

the officers received the results of the LEIN check indicating an outstanding traffic warrant. (EH at 11.) As the officers began to handcuff Mr. Jenkins, a handgun fell from his waist. (EH at 12.) The officers transported Mr. Jenkins to the police station without further incident. (EH at 12.)

Once at the stationhouse, the police finally asked Mr. Jenkins why he was at the North Maple complex. Mr. Jenkins explained that his two daughters lived there. (EH at 26.) The police never developed any information that Mr. Jenkins was trespassing at 727 North Maple; in fact, Officer Spickard conceded that Mr. Jenkins was not trespassing. (EH at 25.)

Mr. Jenkins moved to suppress evidence of the handgun. At the evidentiary hearing, the trial judge acknowledged that Officer Spickard's subjective intention to detain Mr. Jenkins from the time the officer sought Mr. Jenkins's identification was "not the relevant point here," and he pressed the prosecutor to explain how Officer Spickard could lawfully detain Mr. Jenkins, "once he asked for identification ... and he admitted that he was detaining him." (EH at 47.) In a ruling placed on the record on March 5, 2002, the trial judge found:

that the police officer restrained the defendant at the time he asked for the ID. His testimony, very frankly, was that the defendant was not free to leave at the time he asked for his identification. The officer took his

identification. Then there was a sort of, I don't know, walk away and follow away afterwards. But the reality is that the seizure was made at the time he was restrained. And there was at that point in time no reasonable basis for the officer to do so.

(Transcript of 3/5/2002 Motion Hearing at 4 (emphasis added).)

When the prosecutor acknowledged that he could not proceed in light of this ruling, the trial judge dismissed the three pending charges: carrying concealed weapon, felon in possession and felony firearm.⁴

The prosecutor timely appealed the trial court's ruling which was affirmed by a majority of the Court of Appeals panel on November 18, 2003. The prosecutor applied for leave to the Michigan Supreme Court, and on September 16, 2004 this Court entered an order for oral argument on the prosecutor's application and permitted the parties to file supplemental briefs within 28 days.

⁴ Not "the single charge of carrying concealed weapon" as indicated at pages 2 and 5 of the prosecutor's Application for Leave to Appeal.

ARGUMENT

- I. IT IS REASONABLE FOR A 21-YEAR-OLD BLACK MALE, NEITHER BEING LOUD NOR DRINKING, WHO HAS BEEN SINGLED OUT OF A GROUP OF 15-20 LOUD DRINKERS ON A SUMMER EVENING IN THE COURTYARD OF A PUBLIC HOUSING COMPLEX WHERE HE DID NOT LIVE AND APPROACHED BY TWO ARMED, UNIFORMED POLICE OFFICERS TO BELIEVE THAT HE CANNOT IGNORE THE POLICE AND WALK AWAY WHEN THEY SEEK HIS IDENTIFICATION IMMEDIATELY AFTER AN APPARENT RESIDENT SWEARS AT HIM, ASKS HIM WHO HE IS AND WHY IS HE ON HER PORCH.

A. Supplemental Counter-Statement of Standard of Review

This Court reviews a trial court's factual findings in a suppression hearing for clear error, People v. Stevens (After Remand), 460 Mich 626, 630; 597 NW2d 53, 56 (1999), and requests that the Court reinforce that standard by adopting the well-established Sixth Circuit rule requiring that the evidence presented at a suppression hearing be reviewed "in the light most likely to support the district court's decision." United States v. Richardson, No. 02-6146, 2004 WL 2113028, at *2; 2004 Fed App 0325P (6th Cir. Sept. 24, 2004), United States v. Williams, 962 F2d 1218, 1221 (6th Cir.), cert den, 506 US 892; 113 S Ct 264; 121 L Ed 2d 194 (1992).

The application of facts to a constitutional standard is a question of law which this Court reviews de novo. Stevens, supra, 460 Mich 626, 630-631.

B. A Seizure Occurs If Under All The Circumstances A Reasonable Person Would Have Believed He Was Not Free To Leave.

Obviously, not all police-citizen contact is subject to the Fourth Amendment's prohibitions against unreasonable search and seizure. INS v. Delgado, 466 US 210, 215; 104 S Ct 1758, 1762; 80 L Ed 2d 247 (1984). As this Court observed in People v. Shabaz, 424 Mich 42, 56-57; 378 NW2d 451 (1985), cert dis as moot, 478 US 1017; 106 S Ct 3326; 92 L Ed 2d 733 (1986):

[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. United States v. Mendenhall, 446 US 544, 555 [100 S Ct 1870, 1877; 64 L Ed 2d 497] (1980) (opinion of Stewart, J.). The person approached, however, need not answer any questions put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. United States v. Mendenhall, supra, [446 U.S. 544,] 556 (opinion of Stewart, J.). If there is no detention -- no seizure within the meaning of the

Fourth Amendment -- then no constitutional rights have been infringed.

(Citations omitted.) (Quoting Florida v. Royer, 460 US 491, 497-498; 103 S Ct 1319, 1324; 75 L Ed 2d 229 (1983) (White, J., plurality opinion).)

The standard for determining whether a Fourth Amendment seizure has occurred is whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." INS v. Delgado, supra, 466 US 210, 215, People v. Mamon, 435 Mich 1, 8; 457 NW2d 623, 626 (1990) (Riley, C.J., plurality opinion). "[A]ny assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account all the circumstances surrounding the incident in each individual case." Michigan v. Chesternut, 486 US 567, 572; 108 S Ct 1975, 1979; 100 L Ed 2d 565 (1988) "The test is necessarily imprecise," explained a unanimous U.S. Supreme Court in Chesternut, supra, 486 US 567, 573-574,

because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to "leave" will vary, not only with the particular police conduct

at issue, but also with the setting in which the conduct occurs.

While the test is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police.

Accordingly, in order to decide whether Mr. Jenkins was seized at the time the officers sought his identification, this Court should consider all the circumstances up to that point and determine whether a reasonable person in Mr. Jenkins's place would have felt that he or she was not free to leave.

C. Mr. Jenkins Was Seized At The Time The Officers Sought His Identification Because Under All The Circumstances A Reasonable Person Would Have Believed He or She Was Not Free To Leave.

The burden of proving the validity of a warrantless search or seizure is on the prosecutor. See People v. Davis, 442 Mich 1, 10; 497 NW2d 910, 914 (1993). Considering the totality of the circumstances at the time Officer Spickard sought Mr. Jenkins's identification, this Court should conclude that the prosecutor failed to establish that Mr. Jenkins was not seized within the meaning of the Fourth Amendment because a reasonable person in the defendant's place would have believed that he or she was not free to leave.

As quoted above, the Chesternut opinion indicates that among the relevant circumstances is "the setting in which the conduct occurs." 486 US 567, 573, quoted in Mamon, supra, 435 Mich 1, 9. This case arose in the courtyard of a public housing complex - a high crime, high drug area. (EH at 8.) Throughout the courtyard there were 15-20 people being loud and drinking, (EH at 4-5), on a summer evening, (EH at 31). Two police officers arrived in a marked patrol vehicle in full uniform with visible badges, handcuffs and firearms. (EH at 29.) Compare the circumstances of the officers' arrival and appearance in the instant case, with the facts of United States v. Mendenhall, supra, 446 US 544, 555 (opinion of Stewart, J.), where "[t]he agents wore no uniforms and displayed no weapons."

The police officers had been dispatched to the area of 729 North Maple Road to investigate an apparent citizen complaint concerning the crowd. (EH at 4-5.) Officer Spickard, a ten-year police veteran, (EH at 4), was familiar with the area and with many of the people in the courtyard, (EH at 8, 21). It is certainly reasonable to conclude that the officers were generally concerned for their safety and somewhat apprehensive about the situation. Nothing in the record suggests that they downplayed their apparent authority as police officers while responding to this dispatch, and the trial judge indicated after hearing the testimony in this matter that, at the time he sought

Mr. Jenkins's identification, Officer Spickard subjectively intended "to try to break up the crowd," (EH at 47).

After arriving in the courtyard, Officer Spickard scanned the faces in the crowd, (EH at 21), and then he and Officer Lind, (EH at 5), walked directly to the porch steps of 727 North Maple where Mr. Jenkins sat. (EH at 33.) No doubt it would be significant to a reasonable, innocent person in the defendant's circumstances that the police walked directly up to him or her given the apparent criminal behavior going on all around. Officer Spickard testified that his duties included policing incidents of open intoxicants, (EH at 6), and he saw "certainly plenty of alcohol in the area," (EH at 19), including many people who held alcohol in their hands. (EH at 18 (quoting from Officer Spickard's police report)). Additionally, Officer Spickard testified that the group in the courtyard was being loud. (EH at 23.) Nevertheless, Officer Spickard walked right up to Mr. Jenkins, who had not been drinking, (EH at 33), who was not holding any alcohol, (EH at 22), and who was never seen being loud, (EH at 22). An approach by the police under these circumstances - by-passing more than a dozen guilty loud drinkers in order to go straight to an apparently innocent Mr. Jenkins - is a circumstance tending to make a reasonable person believe that he or she was not free to simply ignore the police.

Another of the circumstances that this Court should consider is the manner in which Officers Spickard and Lind positioned themselves with respect to Mr. Jenkins. Exhibit 6, attached hereto as Appendix, Page 2, shows that the porch steps of 727 North Maple are surrounded on three sides by the townhouse and two sturdy, reinforced railings. The two police officers walked to the only area of egress from the steps where they stood in front of Mr. Jenkins as he sat on a lower step. Another person was sitting on a (higher) step behind him. (EH at 20.) In this way, the officers positioned themselves in front of and above Mr. Jenkins and between him and any path he would have to take to walk away from them.

In People v. Bloxson, 205 Mich App 236, lv den, 447 Mich 1040 (1994), three casually dressed, apparently unarmed detectives boarded a bus. Two of the detectives sat in the back of the bus while the third approached the defendant and stood in the aisle next to the seat in front of him. The detective identified himself and repeatedly asked the defendant if he was carrying any weapons. After initially denying it, defendant admitted that he had a gun upon further questioning. The Michigan Court of Appeals determined that the Bloxson defendant had been seized during the questioning by the detective. Among other factors, the court considered the physical position of the detective standing in the aisle over the defendant and between

the defendant and the bus door as support for its conclusion that a reasonable person would not feel free to leave.

Another bus case, United States v. Drayton, 536 US 194; 122 S Ct 2105; 153 L Ed 2d 242 (2002), determined that the defendant was not seized based on the totality of the circumstances which included the fact, repeated over and over in the opinion, that at no time did any of the three police officers block the aisle or the doors of the bus.

In the instant case, the fact that Officers Spickard and Lind positioned themselves in front of Mr. Jenkins in the only area of egress from the steps of 727 North Maple is a circumstance suggesting that a reasonable person would not feel free to leave.

After he and his partner approached the seated Mr. Jenkins, Officer Spickard looked down began asking questions: What was going on? Is there a reason why everybody is gathering? (EH at 5.) There is no indication in the record that Mr. Jenkins responded to these questions, agreed to talk to the officers, or was even willing to listen to them at this point. Compare Shabaz, supra, 424 Mich 42, 56 ("[O]fficers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen.")

While Officer Spickard was talking, the door to 727 North Maple opened up and a woman started pointing and swearing at Mr. Jenkins: "Who the fuck are you and why are you on my porch?" (EH at 5-6.) Sitting on the steps with two uniformed armed police officers standing right in front of him, officers who had singled him out of a crowd of people apparently illegally drinking alcohol, Mr. Jenkins was then questioned more directly and personally by Officer Spickard: "Do you live in the complex?" (EH at 7.) Clearly it would have been reasonable for an innocent person to have believed that he or she was not free to ignore that question and walk away, especially considering the unknown woman's inflammatory questioning. In any event, Mr. Jenkins responded to Officer Spickard's question and acknowledged that he did not live there. (EH at 7.)

Officer Spickard then sought Mr. Jenkins's identification. (EH at 7.) An officer seeking identification is a significant, although not dispositive, circumstance tending to show that a person has been seized. In People v. Freeman, 413 Mich 492; 320 NW2d 878 (1982), this Court considered whether a defendant who had been sitting behind the wheel of an idling vehicle parked in a dark, deserted private parking lot next to a darkened house at 12:30 a.m. was seized when two police officers "asked" him to leave the vehicle and provide identification and the car's registration. One of the officers had testified that

the defendant was not free at that point. Without dissent, the Court held that the defendant "was 'seized' within the meaning of the Fourth Amendment when the police officers asked him to leave his automobile and to provide identification." Freeman, supra, 413 Mich at 494-95 (footnotes omitted). Similarly, in Brown v. Texas, 443 US 47; 99 S Ct 2637; 61 L Ed 2d 357 (1979), a unanimous Court concluded that a defendant was detained by two police officers who pulled their car into an alley where the defendant was walking away from another man and "asked" the defendant to identify himself. When the defendant refused, he was arrested for failing to identify himself.

Part of the whole picture of this case also includes Officer Spickard's determination that, from the time he sought Mr. Jenkins's identification, Mr. Jenkins was not free to leave. (EH at 26-27.) An intention to detain an individual can be communicated in a wide variety of ways, and was significant in this Court's decision in Freeman as well as in the U.S. Supreme Court's opinions in Brown (Fourth Amendment seizure occurred) and INS v. Delgado, supra, 466 US 210 (No Fourth Amendment seizure occurred based, in part, on the fact that the respondents were free to leave.). More recently, in Drayton, supra, 536 US 194, 198 the Court, in setting forth the relevant facts of the case, observed that "[a]ccording to [Officer] Lang's testimony, passengers who declined to cooperate with him

or who chose to exit the bus at any time would have been allowed to do so without argument." In the instant case, Officer Spickard testified that he sought the defendant's identification based in part on his beliefs that Mr. Jenkins "probably didn't belong there, and perhaps wasn't wanted there." (EH at 23.) These beliefs, coupled with the officer's intention to detain Mr. Jenkins at least until he produces identification, no doubt animated the officer's efforts to identify Mr. Jenkins, particularly if this Court reviews the evidence "in the light most likely to support the district court's decision." United States v. Roark, 36 F3d 14, 16 (6th Cir 1994).

Like the Courts in Freeman and Brown, Officer Spickard indicated that he "asked" Mr. Jenkins for his identification. (EH at 7, 23.) This characterization should not be given much weight by this Court given Officer Spickard's questionable ability to distinguish between a request and an order. Later in his encounter with Mr. Jenkins, Officer Spickard put his hand on the small of Mr. Jenkins's back and said "Shawn, you just need to hold on for a minute while we get the results of your name check and then you'll be free to go." (EH at 10.) Even the prosecutor and the Court of Appeals dissent acknowledge that, by this time, the defendant had been detained. Nevertheless, at the evidentiary hearing, Officer Spickard characterized this statement to Mr. Jenkins as a "request." (EH at 11.)

And Officer Spickard did nothing to indicate to Mr. Jenkins that he did not have to comply with the "request" to produce identification. Officer Spickard never advised Mr. Jenkins that he could refuse to hand over his identification; nor did he indicate by word, tone of voice, gesture, body position, or in any other manner that Mr. Jenkins was free to leave or that Mr. Jenkins could lawfully ignore the officer.

This Court should conclude that Officer Spickard had seized Mr. Jenkins by the time he sought the identification because there are reasonable, innocent people who, in Mr. Jenkins's place, would not consider themselves free to simply ignore Officer Spickard, get up off the steps, brush between the two uniformed officers and walk away.

II. GIVEN THE LACK OF ANY SPECIFIC ACCUSATION OR COMPLAINT FROM THE UNIDENTIFIED WOMAN, OFFICER SPICKARD DID NOT REASONABLY SUSPECT THAT MR. JENKINS WAS COMMITTING A CRIME BASED ON OBJECTIVE, ARTICULABLE FACTS AT THE TIME THE OFFICER SOUGHT MR. JENKINS'S IDENTIFICATION.

A. Supplemental Counter-Statement of Standard of Review

Mr. Jenkins reiterates the supplemental counter-statement of the standard of review that he offered in the previous section, supra, at 10, including his request that the evidence from the suppression hearing be reviewed "in the light most likely to support the district court's decision." United States v. Guimond, 116 F3d 166, 169 (6th Cir 1997), cert den, 530 US 1268; 120 S Ct 2733; 147 L Ed 2d 995 (2000).

B. Discussion

As this Court well knows, an officer's Terry stop must be justified, if at all, by looking at all the circumstances and determining whether "the officer observe[d] unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." Terry v. Ohio, 392 US 1, 30; 88 S Ct 1868, 1884; 20 L Ed 2d 889 (1968). According to People v. Shabaz, supra, 424 Mich 42, 54-55:

An investigatory stop must be justified by some objective manifestation that

the person stopped is, or is about to be engaged in criminal activity. ... [T]he totality of the circumstances--the whole picture--must be taken into account. Based upon that whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.

...

... [This] process ... must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in Terry v Ohio, supra, [392 US 1, 21] said that "[t]his demand for specificity in the information upon which police action is predicated is the central teaching of the Court's Fourth Amendment jurisprudence."

Officer Spickard testified that he the unidentified woman's questions indicated to him that Mr. Jenkins "probably didn't belong there and perhaps wasn't wanted there," (EH at 23), so he called in the LEIN check to determine, inter alia, whether Mr. Jenkins had a personal protection order, (EH at 26). Nevertheless, the only offense that the prosecutor maintains that Officer Spickard reasonably suspected Mr. Jenkins of was trespassing, MCL 750.552, Prosecutor's Application for Leave to Appeal at 5, 7. This statute provides that

[a]ny person who shall wilfully enter, upon the lands or premises of another without lawful authority, after having been forbidden so to do by the owner or

occupant, agent or servant of the owner or occupant, or any person being upon the land or premises of another, upon being notified to depart therefrom by the owner or occupant, the agent or servant of either, who without lawful authority neglects or refuses to depart therefrom, shall be guilty ...

(Emphasis added.) Trespassing was the same offense that this Court considered in People v. Freeman, supra, 413 Mich 492, 496-97, where it was noted that:

It is not an offense for an individual to be upon the private property of another unless he has entered 'after having been forbidden so to do by the owner or occupant'⁹ or refused to depart after having been told to do so.

⁹ MCL § 750.552

As in Freeman, the circumstances in the instant case did not permit Officer Spickard to reasonably suspect that Mr. Jenkins had previously been forbidden from sitting on the porch steps. It is clear from the language the woman used ("Who ... are you and why are you on my porch?") that she did not know who Mr. Jenkins was. She never referred to a time that she had seen Mr. Jenkins previously, and she neither told him to leave ("Get off my porch") nor referred to a time in the past that she had done so ("I thought I told you to get off my porch"). Without any indication that Mr. Jenkins had been previously prohibited from

returning to the steps, Officer Spickard, like the police in Freeman, could not reasonably suspect that Mr. Jenkins was trespassing. It was simply a hunch.

Officer Spickard's suspicion that Mr. Jenkins "probably didn't belong there," (EH at 23) is particularly unreasonable in light of the fact that the unidentified woman never said a word to either of the two uniformed officers who were standing at the foot of the porch steps. After all, if the woman really intended to complain that Mr. Jenkins was breaking the law by trespassing, it seems reasonable to conclude that she would have mentioned it to the police. Her failure to speak to the officers standing right in front of her is some indication that Mr. Jenkins was not committing a crime.

Moreover, Officer Spickard testified that he saw this woman for such a brief period of time that he would not have been able to identify her if he saw her again. (EH at 23-24.)

In determining whether information from a citizen-informant is sufficient to provide police officers with reasonable suspicion for a Terry stop, this Court in People v. Tooks, 403 Mich 568, 577; 271 NW2d 503, 505 (1978), looked at three factors: (1) the reliability of the particular informant, (2) the nature of the particular information given to the police, and (3) the reasonability of the suspicion in light of the above factors. In the instant case, there is no basis to

conclude that the woman at the door of 727 North Maple was reliable. Her choice of words, her failure to address the police, the brevity of her appearance at the doorway, and her very anonymity all tend to diminish her reliability. As for the nature of the particular information given to the police, it was only provided to the police indirectly, it included no accusation of illegal behavior, it made no reference to a previous time when she had even seen Mr. Jenkins let alone when he had been told not to return, and it included no information about herself. Considering the reliability of the informant and the inchoate nature of the information, it was unreasonable for Officer Spickard to suspect that Mr. Jenkins was trespassing.

The unidentifiable woman's questions are similar to anonymous tips offered to establish reasonable suspicion.

Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated, see Adams v. Williams, 407 US 143, 146-147; 92 S Ct 1921; 32 L Ed 2d 612 (1972), "an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity," Alabama v. White, 496 US [325], 329; 110 S Ct 2412[; 110 L Ed 2d 301 (1990)]. As we have recognized, however, there are situations in which an anonymous tip, suitably corroborated, exhibits "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop." Id., at 327, 110 S Ct 2412.

Florida v. J.L., 529 US 266, 270; 120 S Ct 1375, 1378; 146 L Ed 2d (2000). The tip in J.L., that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun, lacked the necessary indicia of reliability for a Terry stop according to a unanimous U.S. Supreme Court. There was no predictive information, so the police could not test the informant's knowledge or credibility. Moreover there was no "show[ing] that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality." At 272.

In the instant case, there was no predictive information, so the police could not test the informant's knowledge or credibility. Not only was there no showing of the woman's knowledge that Mr. Jenkins was trespassing, she never even made that assertion. At least in Florida v. J.L. the police had "the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L." At 271. In the instant case, the unknown, unaccountable informant made no report of a crime whatsoever that was linked to Mr. Jenkins.

Officer Spickard's brief, unexplained characterization of the apartment complex as a "high crime, high drug area," (EH

at 8), provides no justification for the stop in this particular case. While it is permissible to consider the character of the stop's location, presence in a high-crime area is not sufficient to justify a stop. Brown v. Texas, supra, 443 US 47, 52 (1979), Shabaz, supra, 424 Mich 42, 60 ("Defendant's presence in a high-crime neighborhood does nothing to distinguish him from any number of other pedestrians in the area. It provides no particular reasonable basis for suspicion as to the activity of the defendant.") More importantly, there is no indication in the record that trespassing is a crime for which this "high crime, high drug area" is well known. While the officer is entitled to rely on his experience, on this record, there is no showing that trespassing is a problem in this particular location such that Officer Spickard could have legitimately consider the character of the apartment complex as a justification for suspecting Mr. Jenkins of trespassing.

The prosecutor points to other facts that "supported a conclusion that police had sufficient suspicion to detain Defendant."⁵ Other than the presence in a high-crime area, every one of these facts arose after Officer Spickard sought the defendant's identification. Obviously, facts and circumstances

⁵ "[H]is repeated attempts to put his hand inside a large pocket; his attempt to walk away from the police when he knew his identity was being investigated; his presence in a high-crime area; and the various attempts by other subjects (sic) to harbor Defendant from police." Application for Leave to Appeal at 7.

which arose following a Fourth Amendment seizure cannot be relied upon to justify the stop, e.g. Florida v. J.L., supra, 529 US 266, 271. Accordingly, these facts are not properly included within the totality of circumstances that this Court appropriately may consider.

At the time he sought Mr. Jenkins's identification, Officer Spickard had nothing more than an inchoate and unparticularized suspicion that Mr. Jenkins had been previously ordered not to return to the steps and it was unreasonable for him to suspect that Mr. Jenkins was trespassing.

III. IN THE EVENT THAT THIS COURT DETERMINES THAT OFFICER SPICKARD DID NOT STOP MR. JENKINS BY THE TIME HE SOUGHT THE IDENTIFICATION, THIS COURT SHOULD REMAND THIS MATTER TO THE TRIAL COURT TO CONSIDER WHETHER MR. JENKINS WAS SUBJECTED TO A TERRY STOP AFTER HIS IDENTIFICATION WAS REQUESTED AND, IF SO, WHETHER THE STOP WAS BASED ON REASONABLE SUSPICION.

Simply concluding as a matter of law that Officer Spickard did not implicate the Fourth Amendment up to and including the time he sought Mr. Jenkins's identification does not the constitutional inquiry in this matter. There were subsequent events which, when considered along with those that preceded them, make it clear that Mr. Jenkins was stopped by the police prior to the discovery of the outstanding warrant. If this Court concludes that the actions of the police did not amount to a Terry stop by the time Mr. Jenkins's identification was sought, this Court should remand this matter to the trial court to consider whether Mr. Jenkins was subjected to a Terry stop after his identification was requested and, if so, whether the stop was based on reasonable suspicion. Mr. Jenkins made a related request in his Brief on Appeal in the Michigan Court of Appeals, at 38-41, and in the trial court, EH at 45-46.

Once Officer Spickard sought Mr. Jenkins's identification, the defendant stood up, (EH at 7), removed a facially valid Michigan State Police identification card, (EH at 27-28),

from his back pocket, (EH at 34), and showed it to the police, (EH at 7). Officers Spickard and Lind retained possession of Mr. Jenkins's ID card during the entire time they were interacting with Mr. Jenkins and made no effort to return it. (EH at 27-28.) This action was intentional on the part of Officer Spickard who testified that he would not have returned the card to Mr. Jenkins pending the results of the LEIN check. (EH at 28.) In this way, the encounter between Officer Spickard and Mr. Jenkins immediately rose to the level of a seizure after Officer Spickard received and retained the identification.

One of the significant differences between Mendenhall, supra, 446 US 544, and Royer, supra, 460 US 491, is that in Royer the agents retained possession of the defendant's identification and airline ticket. As Justice White explained for the four-justice plurality, Royer, supra, 460 US 491, 503n9:

Royer's ticket and identification remained in the possession of the officers throughout the encounter; the officers also seized and had possession of his luggage. As a practical matter, Royer could not leave the airport without them. In Mendenhall, no luggage was involved, the ticket and identification were immediately returned, and the officers were careful to advise that the suspect could decline to be searched. Here, the officers had seized Royer's luggage and made no effort to advise him that he need not consent to the search.

Justice Blackmun's dissenting opinion also observed that these differences "transform[ed Royer's] otherwise identical encounter from an arguably consensual one into a seizure clearly requiring some justification under the Fourth Amendment." Royer, supra, 460 US 491, 517n2.

In the instant case, the officer's retention of Mr. Jenkins's identification amounted to a seizure of Mr. Jenkins himself. Just as the passenger in Royer was seized when the agents refrained from returning defendant's identification and airline ticket, so was Mr. Jenkins restrained when, after reading the card, learning Mr. Jenkins's name and observing that the ID card was facially valid, (EH at 27-28), Officer Spickard's continued to retain possession of the card. This Court should conclude that a reasonable person in the shoes of Mr. Jenkins would believe that he or she was not free to leave, just as it was reasonable for Mr. Royer to believe that he was not free to leave. Thus the continued retention of the card mandates a conclusion that Mr. Jenkins was seized within the meaning of the Fourth Amendment.

Many other jurisdictions have concluded that an officer seizes a person for Fourth Amendment purposes by retaining the person's identification, even only momentarily. For example, in State v. Daniel, 12 SW3d 420 (Tenn. 2000), the Supreme Court of Tennessee considered whether a police officer

seizes a person standing in a parking lot by asking for his identification and retaining it while he ran a computer check for outstanding warrants. All of the members of the court agreed that the officer had stopped the defendant, at least by the time he retained the identification for the warrant check. The majority held that the Fourth Amendment was not implicated merely by the officer's requesting the identification, the point upon which the dissenting justices disagreed with the majority. "However," the majority observed,

what begins as a consensual police-citizen encounter may mature into a seizure of the person. While many of the circumstances in this case point in the direction of a consensual police-citizen encounter, one circumstance reflects a distinct departure from the typical consensual encounter--Officer Wright's retention of Daniel's identification to run a computer warrants check. Without his identification, Daniel was effectively immobilized. Abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society. ... Accordingly, we hold that a seizure within the meaning of the Fourth Amendment ... occurred when Officer Wright retained Daniel's identification to run a computer warrants check.

Daniel, supra, 12 SW3d 420 at 427 (20 citations omitted).

Similarly, the Supreme Court of Colorado unanimously concluded, in People v. Jackson, 39 P3d 1174 (Colo. 2002), that

a police officer who sought and obtained the identification card of a passenger in a motor vehicle, told him to "hang tight" and took the card to his patrol car for a routine warrant check has seized the passenger under the Fourth Amendment. The court

[a]cknowledge[d] that many cases have concluded that the reason retaining a defendant's drivers license or travel ticket implies a seizure is because one cannot legally drive a car without a driver's license or board a bus, train, or plane, without a ticket. Here, in contrast, Defendant would not have violated any law by leaving the scene without his identification. However, we find this to be a superficial distinction. The need for identification is pervasive in today's society, and a reasonable person would not consider abandoning his identification a practical option. Thus, even though Defendant's identification was not technically or legally required to leave the scene, as a practical matter, a reasonable person in his position would not have felt free to leave without it.

Jackson, supra, 39 P3d 1174, 1189 (citations omitted).

Likewise, in United States v. Jordan, 958 F2d 1085 (DC Cir 1991), an officer requested identification from the defendant who had just gotten off an intercity bus. While still holding the defendant's driver's license, the officer obtained the defendant's consent to search his tote bag. The court looked to the totality of the circumstances to determine whether

the defendant had been seized at the time he consented to the search.

Acknowledgedly, many circumstances in this case point in the direction of a benign police/citizen encounter: the police were dressed in plainclothes; their weapons were hidden; they spoke in conversational tones; and they did not physically block Jordan's path.

One circumstance, however, reflects a distinct departure from the typical consensual scenario. The police asked for, took, and retained Jordan's driver's license while they continued questioning him.

Jordan, supra, 958 F2d 1085, 1087. The fact that the police retained the defendant's driver's license was a significant fact leading the court to conclude that the defendant had been seized when he consented to the search of his tote bag.

See also United States v. Thompson, 712 F2d 1356 (11th Cir 1983) (Officer's receipt of defendant's identification, followed immediately by a request that defendant hand him a small opaque vial, constituted Fourth Amendment seizure.), United States v. Chan-Jimenez, 125 F3d 1324 (9th Cir 1997) (Driver who had pulled over prior to officer's arrival was seized by officer who obtained and failed to return driver's license and registration while proceeding with investigation.), State v. Painter, 296 Or 422; 676 P2d 309 (1984) (Officer seized man he found walking in an alley by obtaining man's expired driver's

license and retaining it while he questioned the man.), United States v. Lambert, 46 F3d 1064, 1068 (10th Cir 1995) ("[W]hat began as a consensual encounter quickly became an investigative detention once agents received Mr. Lambert's driver's license and did not return it to him," even though the defendant was not driving at the time. "The question is not, as the government seems to suggest, whether it is conceivable that a person could leave the location."). See generally 4 LaFave, Search and Seizure, §9.3(a), at 103 n74 (3d ed, 1996 & Supp 2004) (collecting cases holding that retention of a person's identification or other property constitutes a seizure).

In the instant case, the continued retention of Mr. Jenkins's identification was extended by Officer Jenkins's unsuccessful attempts to call in the name for a LEIN check. The LEIN channel was "busy," so there was a "line, a waiting line or a wait" that prevented Officer Spickard from being able to instantly get through with the name. (EH at 7-8.) Even though he had already examined the identification card and obtained sufficient information from it to conduct the LEIN inquiry, Officer Spickard still made no effort to return the card. Obviously, then, by the time the information was conveyed that there would be an indeterminate wait before the LEIN inquiry could be conducted, and during this wait the officers retained the identification card, a reasonable person in Mr. Jenkins's

situation would have believed that he was not free to leave. Accordingly, even if this Court concludes that the actions of the police did not amount to a Terry stop by the time Mr. Jenkins's identification was sought, this Court should remand this matter to the trial court to consider whether Mr. Jenkins was subjected to a Terry stop by Officer Spickard's continued retention of the identification card after he was unsuccessful in immediately running the LEIN check.

There was no reasonable suspicion to support this continued seizure of Mr. Jenkins because, at the time Officer Spickard finished examining the identification card and tried, unsuccessfully, to call in the name for a LEIN check, Officer Spickard was aware of no additional circumstances than he knew at the time he first sought the card from Mr. Jenkins. The additional factors arguably supporting a stop referred to by the prosecutor at page 7 of the Application for Leave to Appeal, and discussed at the end of the preceding section of this brief, supra at 28-29, arose after Officer Spickard sought the defendant's identification, received the card, read the card, tried to call in the name, and learned that there would be a wait for the LEIN check. (EH at 8-9.) Accordingly, these facts are not properly included within the totality of circumstances that this Court appropriately may consider. Florida v. J.L., supra, 529 US 266, 271. Up until the time Officer Spickard

learned that there would be a wait for the LEIN check, the only specific, articulable facts justifying the Fourth Amendment seizure of Mr. Jenkins were the exact same facts - and no more - that were already addressed in the preceding section. The seizure of Mr. Jenkins once the officer retains the ID card is not supported by reasonable suspicion.

If, as a matter of constitutional law, a reasonable person still would feel that he or she was free to leave even after the officers continued to retain the person's identification following the extended wait to call in the LEIN check, there are additional points in the scenario presented by this case where a reasonable person would no longer feel free to leave. For example, the record may support a conclusion that Officer Spickard repeatedly ordered Mr. Jenkins to keep his hand away from his pocket and that Mr. Jenkins acquiesced to these orders. (EH at 8-9.) Findings of fact on this point were unnecessary given the trial court's conclusion that Mr. Jenkins had been previously seized, but those demands - coupled with all that came before them - may well lead to a conclusion that Mr. Jenkins was seized by then. Additional factual findings are also necessary to determine whether it was reasonable at that point to suspect that criminal activity was afoot. Thereafter, there were calls from others in the area that Mr. Jenkins could come into their homes and "at the same time" Mr. Jenkins "was

wanting to leave" the police contact. (EH at 9.) The police "encouraged," (EH at 10), Mr. Jenkins not to leave. Findings regarding the length of time Mr. Jenkins had waited up to this point, whether the calls from other residents preceded and motivated his walking away, and the tone and the manner of the police "encouragement" would be relevant to a careful determination whether Mr. Jenkins was seized at any one of these points and, if so, whether there was reasonable suspicion to justify such a seizure.

Accordingly, if this Court concludes that the actions of the police did not amount to a Terry stop by the time Mr. Jenkins's identification was sought, this Court should remand this matter to the trial court to consider whether Mr. Jenkins was subjected to a Terry stop after his identification was requested and, if so, whether the stop was based on reasonable suspicion.

IV. IN THE EVENT THAT THIS COURT DETERMINES THAT OFFICER SPICKARD LAWFULLY SEIZED MR. JENKINS AT THE TIME HE ACQUIRED THE IDENTIFICATION CARD, THIS COURT SHOULD REMAND THIS MATTER TO THE TRIAL COURT TO CONSIDER WHETHER THE SUBSEQUENT POLICE CONDUCT IN THIS MATTER EXCEEDED THE LAWFUL SCOPE OF A TERRY STOP.

Even if this Court concludes the officers had reasonable suspicion for a Terry stop at the time they sought Mr. Jenkins's identification, this Court should remand this matter to the trial court to consider whether the subsequent police conduct in this matter exceeded the lawful scope of a Terry stop. Mr. Jenkins made a related request in his Brief on Appeal in the Michigan Court of Appeals, at 41-44, and in the trial court, EH at 45-46.

The intrusion of a Terry stop must be (1) carefully limited to the underlying justification for the stop and (2) utilize the least intrusive means reasonably available to address the officer's suspicion. These requirements were set forth in Florida v. Royer, supra, 460 US 491 at 500 (plurality opinion):

Terry v. Ohio, supra, [392 US 1, 19,] also embodies this principle: "The scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible." ... The scope of the detention must be carefully tailored to its underlying justification.

The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.

(Citations omitted.) Concurring in the result of the four-justice plurality, Justice Brennan also emphasized the limited nature of a Terry stop which "must be so strictly limited that it is difficult to conceive of a less intrusive means that would be effective to accomplish the purpose of the stop." Royer, supra, 460 US 491 at 510-511&n*.

In the case at bar, Officer Spickard failed both to carefully limit his intrusion upon Mr. Jenkins to the underlying justification, nor did he adopt the least intrusive means to investigate his suspicion that the defendant was trespassing.

Officer Spickard testified that he took Mr. Jenkins's identification and called in the LEIN check in order to see if Mr. Jenkins had a warrant, a personal protection order, whether he was on probation or parole "and any other information that might come back through the LEIN network." (EH at 26.) Nothing in the record that suggests that a LEIN check was "strictly tied to" the remarks of the unidentified and unidentifiable woman or reasonably calculated to confirm or dispel a suspicion that Mr. Jenkins was trespassing. For example, Officer Spickard never testified that the LEIN network includes information on people who have been forbidden to enter onto the lands of another. Accordingly, Officer Spickard failed to limit his intrusion to the grounds giving rise to his suspicion, especially when it was discovered that the LEIN channel was busy and there would be a wait. Instead, Officer Spickard was engaging in a generalized fishing expedition. Accordingly, the prosecutor utterly fails to bear its "burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Royer, supra, 460 US 491, 500 (White, J.).

In People v. Harris, 207 Ill 2d 515; 802 NE2d 219 (2003), petition for cert filed, (US Nov. 20, 2003) (No. 03-1224), the Illinois Supreme Court determined that running a

warrant check on a passenger who had been lawfully seized and identified by a police officer following a traffic violation exceeded that scope of a valid Terry stop. The court observed that the warrant check was not reasonably related to the initial justification for the stop, i.e. an illegal left turn. Moreover, at the time of the warrant check, the officer had no reasonable, articulable suspicion that the defendant had committed a crime so as to justify "convert[ing] the stop from a routine traffic stop into an investigation of past wrongdoing by the defendant." Harris, supra, 207 Ill 2d 515, 528.

State v. Johnson, 805 P2d 761 (Utah 1991), unanimously reversed the conviction of a passenger in an automobile which had been lawfully stopped for an equipment violation. When the driver could not produce a registration certificate for the car, the officer identified the passenger and checked her for outstanding warrants. The Supreme Court of Utah concluded that

[w]hile the lack of a registration certificate and the fact that the occupants did not own the car raised the possibility that the car might be stolen, this information, without more, does not rise to the level of an articulable suspicion that the car was stolen. ...

[Officer] Stroud could have, but did not, exercise his right to inquire about the registered owner and how the occupants came into possession of the car. He already knew who the registered

owner was, and a satisfactory answer could have abated his suspicion. An unsatisfactory answer could have heightened his suspicion and justified further inquiry. He did not check stolen car records to ascertain if the car had been reported stolen, nor did he know of a report of a stolen car matching the description of this vehicle. Therefore, the leap from asking for the passenger's name and date of birth to running a warrants check on her severed the chain of rational inference from specific and articulable facts and degenerated into an attempt to support an as yet inchoate and unparticularized suspicion or hunch.

Johnson, 805 P2d 761, 764 (citation and quotation omitted).

See, e.g., State v. Damm, 246 Kan 220; 787 P2d 1185 (1990) (Warrant checks on the passengers of a lawfully stopped vehicle were unreasonable in the absence of reasonable suspicion that the passengers had outstanding warrants.), United States v. Lockett, 484 F2d 89, 91 (9th Cir 1973) (Police, who had lawfully stopped defendant for jaywalking, could not continue to detain him for a warrant check after executing a citation "because they had no reasonable grounds to be suspicious that there might be a warrant outstanding against him."). See generally 4 LaFave, Search and Seizure, §9.2(f), at 62-65 (3d ed, 1996 & Supp 2004).

In addition to failing to limit his intrusion upon Mr. Jenkins to the underlying justification arguably permitting the stop (the comments of the unidentified woman), Officer Spickard

also failed adopt the least intrusive means to investigate his suspicion that the defendant was trespassing.

For example, neither Officer Spickard nor Officer Lind took any steps to speak to the unidentified woman to determine whether she lived there and whether she had previously told Mr. Jenkins to stay away from her porch. Checking with this woman was an obvious, available step that the one of the officers could have taken to quickly confirm or dispel the mere possibility that an occupant or agent had previously prohibited Mr. Jenkins from coming onto the steps.

A second reasonable alternative to forcing Mr. Jenkins to remain during a protracted wait for the LEIN check was to ask the other man sitting on the steps of 727 North Maple whether Mr. Jenkins was trespassing. After all, Officer Spickard testified that he thought that this other man might have been a resident of 727 North Maple. (EH at 20.) If Officer Spickard really intended to investigate a suspicion that Mr. Jenkins was trespassing by the least intrusive means readily available, he might have simply asked the other man sitting on the steps of 727 North Maple a few questions to verify or dispel his suspicion that Mr. Jenkins was trespassing.

Similarly, Officer Spickard could have likely obtained prompt and relevant information from one or more of the many familiar faces he saw in the crowd, (EH at 21), or the person

who apparently called in the complaint from 729 North Maple (EH at 4). Mr. Jenkins's daughters lived in the immediate area. Well after Officer Spickard called in the LEIN request, these residents called out invitations to Mr. Jenkins. Accordingly, it seems likely that some of these residents could have provided information to Officer Spickard more relevant to the suspected trespassing, and certainly more quickly, than anything the officer was likely to learn from the LEIN inquiry.

Of course, the officers could have asked Mr. Jenkins why he was in the courtyard. Mr. Jenkins would have told them, as he did after the arrest, that his daughters lived there. (EH at 26, 34.) The officers could have confirmed this with the daughters' mother or, if she was not readily available, with the defendant's brother who was in the area but unable to hear the conversation between Mr. Jenkins and the police. (EH at 33-34.) This course of action would have been better calculated to confirm or dispel a suspicion that Mr. Jenkins was trespassing than the warrant check.

Accordingly if this Court concludes that the officers had reasonable suspicion for a Terry stop at the time they sought Mr. Jenkins's identification, this Court should remand this matter to the trial court to consider whether the subsequent police conduct in this matter exceeded the lawful scope of a Terry stop.

SUPPLEMENTAL STATEMENT OF RELIEF REQUESTED

WHEREFORE defendant-appellee respectfully requests that this Court enter affirm the Court of Appeals in an opinion discussing the factual circumstances that constitute a Fourth Amendment stop and reasonable suspicion.

Alternatively, Mr. Jenkins requests that this Court deny the prosecutor's Application for Leave to Appeal.

Alternatively, if this Court concludes that peremptory action under MCR 7.302(G)(1), is warranted because the actions of the police did not amount to a Terry stop by the time Mr. Jenkins's identification was sought, Mr. Jenkins requests that this Court remand this matter to the trial court to consider whether Mr. Jenkins was subjected to a Terry stop after his identification was requested and, if so, whether the stop was based on reasonable suspicion.

Alternatively, if this Court concludes that peremptory action under MCR 7.302(G)(1), is warranted because the officers had reasonable suspicion for a Terry stop at the time they sought Mr. Jenkins's identification, Mr. Jenkins requests that this Court remand this matter to the trial court to consider whether the subsequent police conduct in this matter exceeded the lawful scope of a Terry stop.

Respectfully submitted,
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Dated: October 14, 2004

Exhibit 5: 727 and 729 North Maple Road



Exhibit 6: 727 North Maple Road



PROOF OF SERVICE

THIS IS TO CERTIFY that on October 14, 2004 I served
a true copy of the Defendant-Appellee's Supplemental Brief In
Opposition To Plaintiff-Appellant's Application For Leave To
Appeal and Proof of Service by hand-delivery upon:

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